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In The

Supreme Court of the United States

October Term, 1998

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, *et al.*,

Appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of North Carolina

BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

MATTHEW J. ZINN
(*Counsel of Record*)
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-429-3000

JAMES U. BLACKSHER
Title Bldg., Suite 710
300 21st Street North
Birmingham AL 35203
205-591-7238

JACK W. LONDEN, Co-Chair
DANIEL F. KOLB, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
GILDA R. WILLIAMS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
202-662-8600
Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

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BRIEF *AMICUS CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF APPELLANTS

This brief in support of appellants is submitted with the written consent of counsel for all parties filed with the Clerk of the Court.[1]

INTEREST OF THE *AMICUS CURIAE*

The Lawyers' Committee is a non-profit organization created in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights to all Americans. Protection of the voting rights of citizens has been an important aspect of the work of the Committee. The Committee has provided legal representation to litigants in numerous voting rights cases throughout the nation over the last 35 years, including cases before this Court, *see, e.g., Lawyer v. Department of Justice*, 117 S.Ct. 2186 (1997); *Reno v. Bossier Parish School Board*, 117 S.Ct. 1491 (1997); *Young v. Fordice*, 117 S.Ct. 1228 (1997); *United States v. Hays*, 515 U.S. 737 (1995); *Clark v. Roemer*, 500 U.S. 646 (1991); and *Clinton v. Smith*, 488 U.S. 988 (1988). The Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, *see, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900

[1] This brief was not authored in whole or in part by counsel for a party to this proceeding, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

(1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *Mobile v. Bolden*, 446 U.S. 55 (1980).

SUMMARY OF ARGUMENT

The saga of North Carolina's District 12 returns to this Court for the third time because a second district court granted summary judgment for plaintiff-appellees on their equal protection challenge to the redrawn District 12 (previously approved by a different three-judge court). In deciding this case on summary judgment, the majority below committed serious and patent error.

The threshold inquiry in a redistricting case such as this is whether race was *the predominant* factor motivating the legislature's redistricting decision. This is a very demanding inquiry, and the party challenging the redistricting plan bears the burden of proof on this issue. Such a party must establish that the legislature's predominant or controlling motivation or intent in constructing the challenged district was a racial classification; that is, an unjustified, stereotypical reliance on the race of residents must have been the factor that predominated over the totality of all of the other factors influencing the legislature's redistricting decision.

Under the racial predominance test, plaintiffs must prove that boundary lines were drawn intentionally and predominantly to include or exclude residents based on their racial or ethnic characteristics. In addition, properly applied, the racial predominance test requires plaintiffs to demonstrate convincingly that reliance on race does not

reflect the redistricting choices and political communities of the voters themselves, but rests on unjustified and unwanted stereotypes regarding their race. Unless the principles of *Shaw v. Reno* and its progeny are clarified, they will be interpreted in a manner that subverts the constitutionally guaranteed freedom of political association and expression of black citizens.

Under this standard, the existence of evidence or inferences tending to show that racial demographics may not have been the predominant factor motivating the legislature's redistricting decision or that the disputed districts reflect actual political communities of interest shared by members of the same racial or ethnic group, should preclude the entry of summary judgment. As long as traditional districting criteria were not entirely neglected and factors other than impermissible racial considerations motivated the legislature, a redistricting decision should not be invalidated on summary judgment as violating equal protection.

In this case, there was more than ample evidence to preclude the entry of summary judgment. This evidence included affidavits from two State legislators intimately involved in crafting the redistricting plan and from numerous expert witnesses. The affidavits raised genuine issues of material fact regarding the legislature's predominant motivation and the relative importance of race in the redistricting decision. Specifically, the record indicated that race was *not* or, at a minimum, may not have been the predominant factor motivating the legislature's decision and that, based on election returns, black voters in District 12 are a part of a strongly cohesive political

community. The district court majority wrongly disregarded most of this evidence. For example, the district court majority relied upon voter registration data to support summary judgment, but ignored evidence that the State had relied upon actual election results, an alternative and more reliable measure of party allegiance, in redrawing District 12. This evidence, and other evidence of a similar nature, should have been evaluated by the court below sitting as a trier of fact.

If this Court were to affirm the district court's judgment in this case, such a decision would likely increase the number of unjustifiable redistricting equal protection challenges brought before this Court and the district courts, and afford an opportunity for some to seek invidious outcomes by filing similar suits. Moreover, the use of summary judgment to adjudicate these types of cases in the district courts will result in more cases appealed directly to this Court on incomplete records, frustrating this Court's ability to apply and shape the law and resulting in inefficient and wasteful litigation.

Finally, even if race is the predominant factor motivating the legislature's decision, a party challenging the redistricting plan still cannot prevail unless the State is unable to satisfy strict scrutiny by demonstrating that such use of race was narrowly tailored to serve a compelling state interest. Strict scrutiny is not a hollow inquiry. Rather, it gives States a realistic opportunity to demonstrate compliance with the Equal Protection Clause, while avoiding liability under section 2 of the Voting Rights Act. Here, the district court majority erroneously and inexplicably failed even to apply the strict scrutiny prong of the equal protection inquiry and, for that reason as

well, its order granting summary judgment must be reversed.

ARGUMENT

I. The Summary Judgment Entered Below Is Erroneous by Any Standard, and It Dramatizes the Need for Clarification and Principled Limitation of the *Shaw v. Reno* Jurisprudence.

In this case, for the third time in just over five years, this Court has been called upon to consider an equal protection challenge to the creation of North Carolina's Congressional District 12. *See Shaw v. Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*). This most recent installment of the District 12 controversy arises because a divided panel of the district court granted summary judgment for plaintiff-appellees who alleged that the redrawn District 12 violates the Equal Protection Clause of the Fourteenth Amendment. The grant of summary judgment here was in error because it employs such an overbroad predominant racial motivation standard that it effectively transforms legitimate political considerations into constitutionally suspect racial classifications wherever there is a correlation between race and the freely formed political associations of citizens themselves.[2]

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[2] While we continue to believe the *Shaw* line of cases creates a species of constitutional violation lacking a requisite injury, we argue here that the district court failed correctly and fully to apply the standard enunciated in those cases.

The summary judgment in the instant action dramatically illustrates the problems posed by the erroneous application of the *Shaw* standards. The district court majority below did not require plaintiffs to prove that the plan's drafters were imposing "unjustified racial classifications," *Bush v. Vera*, 517 U.S. 952, 980 (1996), that is, stereotypical racial assumptions that all black voters "think alike, share the same political interests, and will prefer the same candidates at the polls," *Shaw I*, 509 U.S. at 647. Nor did the district court consider whether black voters in District 12 had freely associated to assert political influence and give expression to shared views through a representative in Congress, whether through formal party institutions or otherwise. On this record, it is plain that plaintiffs were not entitled to summary judgment on the issue of racial predominance. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify. . . . " *Bush*, 517 U.S. at 968.[3]

Thus, when applying the racial predominance test, the courts should consider whether apparent reliance on race constituted an unjustified and potentially demeaning

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[3] The State argues that its drafters considered the wishes of black and white voters of District 12 only indirectly by determining that they had voted for Democratic candidates in the past. While this evidence is responsive, further evidence of the wishes of those voters is clearly relevant. This Court should clarify the meaning of its precedents to prevent both the lower courts and the parties in those courts from failing to give full regard to the constitutionally protected political rights of all citizens.

racial classification, or whether it reflected the recognition of a voluntary affiliation of persons, substantially of a particular racial background, who in fact view themselves as members of a distinct political community.

> If the State's goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice Stevens focuses – precinct general election voting patterns, precinct primary voting patterns, and legislators' experience – to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district. To the extent that the District Court suggested the contrary, it erred. But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.

Id. (citations omitted).

In the instant case the district court majority, on summary judgment, rejected evidence that District 12's lines could be explained on the basis of partisan Democratic Party affiliation, and did not even address the extent to which race or ethnicity correlates with a common political affiliation in District 12. The unavoidable implication of its summary disposition is that the district court misapprehended this Court's *Shaw* jurisprudence as erecting a constitutional impediment to political affiliation and concerted action by black voters. Such a rule would serve to deny to black citizens constitutionally guaranteed freedoms of political association and expression – the opportunity to organize and seek representation of common political concerns among themselves and

in coalitions that unite persons of different races or transcend race – and it would do so on the impermissible basis of the race of those with whom they associate politically. Clearly this Court has laid down no such rule.

The *Shaw* jurisprudence is aimed at preventing state actors from drawing district lines that, *based on arbitrary stereotypes*, "convey the message that political identity is, or should be, predominantly racial." *Bush*, 517 U.S. at 980. It is being misinterpreted, however, as judicial authority to interfere with the rights of American citizens to form political identities themselves. Just as party conventions should be thought of as a "state-created framework" for the "exercise of private political rights," *Morse v. Republican Party of Virginia*, 517 U.S. 186, 271-72 (1996) (Thomas, J., dissenting), so should legislative redistricting be thought of as the exercise of the private political rights of the citizens, acting through the many voluntary political associations which constitute the body politic, to agree on the new shape of their democratic compact. This Court should stand guard equally against the unjustified aggregation of African Americans (and other racial and ethnic minorities) and against the interference with the freedom of citizens of minority racial or ethnic communities to choose to associate with each other and with others to give expression to common political values and interests.[4]

[4] A recent scholarly work makes the same point by "suggest[ing] a standard for gauging judicial intervention: if our government is to remain democratic, then the Court must not speak for the people in a way that prevents the people from finally speaking for themselves." KEITH J. BYBEE, MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 49 (1998).

This Court should reemphasize that the threshold task of demonstrating a predominantly racial purpose which justifies judicial scrutiny of legislative redistricting is "demanding." *See Miller v. Johnson*, 515 U.S. 900, 928 (O'Connor, J., concurring). It should not be enough to show that some lines were drawn purposefully to include or to exclude persons with particular racial or ethnic characteristics. In addition, the greatest care should be taken to ensure that *Shaw* and its progeny are applied to invalidate only racial groupings which constitute impermissible, stereotypical racial classifications, and not to redistricting plans which represent a legitimate recognition of defined political interests substantially shared among members of particular racial or ethnic communities. Plaintiffs should be required to show that legislators or plan-makers did not act on the basis of demonstrable *political* communities of interest, but instead merely assumed that persons with the same racial or ethnic backgrounds share the same political interests.

The district court displayed its fundamental misunderstanding of the *Shaw* racial predominance standard by citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976), and *Washington v. Davis*, 426 U.S. 229 (1976), to support its summary conclusion that a legislative intent to segregate voters was "unexplainable on grounds other than race." J.S.App. 15a (*quoting Arlington Heights*, 429 U.S. at 266). These equal

protection precedents pertain to *discrimination* on the basis of race, an actual injury or disadvantage suffered by the individual plaintiffs. This is the crucial constitutional inquiry the district court never made. As this Court held in *Wright v. Rockefeller*, 376 U.S. 52 (1964), segregation of voters on the basis of race or ethnicity violates the Equal Protection Clause only if it *discriminates* against those voters by minimizing their collective voting strength or by manipulating or stereotyping them in a way that ignores their free and voluntary political interests in the redistricting context.

> It is plain to us that the District Court was not compelled to find that these districts were the product of a state contrivance to *discriminate* against colored or Puerto Rican voters. As the majority below pointed out, the concentration of colored and Puerto Rican voters in one area in the county made it difficult, even assuming it to be permissible, to fix districts so as to have anything like an equal division of these voters among the districts. Undoubtedly some of these voters, as shown by this lawsuit, would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional.

376 U.S. at 57-58 (emphasis added) (footnote omitted). Moreover, the *Shaw* racial predominance standard is more exacting than the standard applied in most equal protection cases, where it is sufficient to prove that a discriminatory purpose was "a motivating factor in the decision."

Arlington Heights, 429 U.S. at 265-66. The word "predominant" means "holding an ascendancy," or "having superior strength, influence, authority or position." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (G. & C. Merriam 1981). Thus, for a redistricting decision to be subject to strict scrutiny, not only must plaintiffs prove that race held a position of superior strength, influence, authority, or position over all of the other factors collectively motivating the legislature in that decision, they must prove that such a reliance on the race of voters discriminatorily classified them in ways which conflict with their freely expressed, voluntary political identities.

Ascertaining the legislature's predominant motivation or intent is no mean task. The district court must undertake a "searching" and "sensitive" inquiry into the evidence, recognizing the "complex interplay of forces that enter into a legislature's redistricting calculus," to determine whether race was, in fact, the predominant factor in a redistricting decision and whether the use of race impermissibly discriminated against plaintiffs, stereotypically or otherwise. *Bush*, 517 U.S. at 958; *Miller*, 515 U.S. at 916-17; *see also Arlington Heights*, 429 U.S. at 266. When a redistricting decision stems from "mixed motive[s]" – that is, when traditional districting criteria are "not *entirely* neglected" – a "careful review" is necessary to determine whether the legislature, in its redistricting calculus, made race the predominant factor over all of the other motives. *See Bush*, 517 U.S. at 959, 963 (emphasis in original). In this review, "the good faith of a state legislature must be presumed." *Miller*, 515 U.S. at 915. In this corner of the political thicket, courts must be ever

vigilant not to upset the delicate balance between constitutional protection of the individual from arbitrary and discriminatory treatment by the government and the equally compelling constitutional guarantee of freedom of association. In every redistricting plan reviewed by the Lawyers' Committee in its long experience working on voting rights issues, it has never found race, or any other single factor, to be the legislature's *sole* motivating factor, but has observed that legislative redistricting actions are always informed by a variety of different motives.[5] It is only the relative importance of the various motives that varies from case to case.

Because of the high complexity and sensitivity of the racial predominance test, summary judgment should not be granted to plaintiffs in a *Shaw v. Reno* type action unless there is no dispute as to the impermissible use of race. For purposes of deciding a plaintiff's motion for summary judgment in a case such as this, evidence or inferences tending to show that race may not have been an impermissibly predominant factor motivating the legislature's redistricting decision should be sufficient to defeat such a motion. Certainly, where the evidence shows only that the race of residents is correlated with some of the District's boundaries, as in the instant case, the plaintiffs' and the district court's task has only begun, and a summary conclusion of unconstitutionality cannot be justified.

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[5] It is exceedingly rare, in any case, for a legislature to make decisions motivated by a single concern. *See Arlington Heights*, 429 U.S. at 265.

In racial equal protection cases that do not involve redistricting, a detailed review of the history of the legislation and even testimony from legislators may be necessary to discern legislative intent. *Arlington Heights*, 429 U.S. at 267-68. If that level of factual inquiry is required in cases where the plaintiff must prove only that race was *"a* motivating factor in the decision," *id.* at 265-66 (emphasis added), the factual inquiry into legislative motivation or intent is required to be even more painstaking and deliberate in a case where the plaintiff must demonstrate that race was *"the predominant* factor motivating the legislature's [redistricting] decision[,]" not simply *"a* motivating factor." *Bush*, 517 U.S. at 959 (emphasis in original). According to the plurality in *Bush*, the required review in a case such as this one must take into account "evidence regarding the redistricting plan's respect for traditional districting principles, the legislators' expressed motivations, and the methods used in the districting process." 517 U.S. at 959. By granting summary judgment below, the district court largely dispensed with this review.

The record here contains more than enough evidence for a trier of fact to find that the legislature was motivated predominantly by factors other than race and that traditional districting criteria, including respect for demonstrated *political* communities of interest, were not entirely disregarded in the redistricting legislation. Two key committee chairmen stated emphatically that race was *not* the predominant factor in the redistricting decision. The respective Chairmen of the Redistricting Committees of the North Carolina Senate and House of Representatives, Roy A. Cooper, III, a Democrat, and W.

Edwin McMahan, a Republican, submitted affidavits discussing the principal factors that motivated the legislature in designing the redistricting plan. J.S.App. 69a, 79a. The two legislators agreed that the goals of the redistricting legislation were, first, to cure the constitutional defects in the prior plan by assuring that race was not the predominant factor in constructing the plan and that traditional redistricting criteria were not subordinated to race and, second, to maintain the existing partisan balance in the State's congressional delegation and to protect incumbents. J.S.App. 72a-73a, 81a.[6] Senator Cooper and Representative McMahan acknowledged that race was considered in developing the plan, but testified that it was not the dominant or controlling purpose. J.S.App. 77a, 83a. In fact, Professors Lublin and Voss have independently observed that the legislative record in North Carolina "shows that incumbency was a major factor in the construction of new districts and that legislators were keenly aware of the constraints they faced in attempting to draw a constitutional plan." David Lublin & D. Stephen Voss, *The Partisan Impact of Voting Rights Law: A Reply to Pamela S. Karlan*, 50 STAN. L. REV. 765, 774 (1998) (hereinafter "Lublin & Voss"). This record was, for all practical purposes, ignored by district court majority.

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[6] Senator Cooper noted in his affidavit that the boundaries of District 12 had to be drawn to avoid placing the residences of two sitting congressmen within the District and to exclude from the District the home county of a third congressman. J.S.App. 75a. This evidence, ignored by the majority in the district court but credited by the dissenting judge, J.S.App. 37a, suggests that "incumbency protection might explain as well as, or better than, race" the North Carolina legislature's decision to design District 12 the way that it did. *See Bush*, 517 U.S. at 967.

The North Carolina legislators also testified that "election results" were the principal analytical tool used to configure the districts in a way that preserved the partisan balance. J.S.App. 73a, 81a-82a. Senator Cooper stated that "partisan election data, not race, was the predominant basis for assigning precincts to districts," including District 12, and that the inclusion of precincts having significant black populations in District 12 was "simply the result of a strong Democratic voting pattern among blacks." J.S.App. 77a. Assuming the veracity of this testimony, as the district court should have done on summary judgment, use of such election data in this manner for crafting legislative districts plainly does not implicate race as the predominant factor in the redistricting plan. A correlation between race and political affiliation does not convert a permissible political gerrymander into an unconstitutional racial gerrymander. *See Bush*, 517 U.S. at 968. This is so whether the political cohesion of black voters demonstrated in the election returns accurately characterizes them as loyal Democrats or simply as politically unified voters.

The district court majority disregarded this evidence of reliance on actual voting data from actual elections – that is, evidence of how voters themselves reveal their political identities, and relied instead on different data showing that certain areas with heavy Democratic registration and a higher percentage of white voters were excluded from District 12. J.S.App. 8a-9a, 20a-21a. In doing so, the majority below impermissibly weighed the probative value of conflicting evidence, something it may not do on summary judgment. There is a genuine issue of fact in this case as to whether the State's reliance on

election results from actual elections is any less valid than the district court majority's reliance on voter registration data. By disregarding the State's evidence on this point, the district court majority, in effect, treated the use of election results as tantamount to a constitutionally impermissible form of race-conscious decision-making, rather than as a more reliable method of measuring political party strength and loyalty, and, more importantly, as evidence of the real political community of interests in District 12 with which black voters have chosen to associate themselves.

Party registration, party identification, and electoral support for candidates are all legitimate indicators of party strength. Yet, one study recently indicated that, in North Carolina, "the success of a party's candidates is the best measure of party vitality." *See* Thomas A. Kazee, *North Carolina: Conservatism, Traditionalism, and the GOP*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 152 (Charles S. Bullock, III & Mark J. Rozell, eds., 1998) (hereinafter "Kazee"). This conclusion follows from the fact that voter registration data does not take into account voters who do not always cast ballots for candidates from their registered party, whereas actual election results do reflect such party-line defections. *See* Kazee, *supra*, at 152 ("Ticket splitting and partisan defection make declarations of partisan affinity less valid measures of party strength"); *see also* J.S.App. 33a (dissenting opinion). In the South in particular, scholars have found that "Republican candidates have frequently run ahead of their party identification numbers[,]" and that white registered Democrats are more apt to vote for Republican candidates than black registered Democrats. *See* Charles

S. Bullock III & Mark J. Rozell, *Southern Politics at Century's End*, in THE NEW POLITICS OF THE OLD SOUTH: AN INTRODUCTION TO SOUTHERN POLITICS 10-11 (Charles S. Bullock, III & Mark J. Rozell, eds., 1998); *see also* Lublin & Voss, *supra*, at 769 ("National trends favoring the Republicans mainly affect white but not black voting behavior because African Americans are more loyal Democrats").

It was incumbent upon the district court to test the evidence of voter registration data on which it relied against the evidence of reliance upon actual election results proffered by the State defendants at trial. This latter evidence may have persuaded the district court, sitting as the finder of fact, to conclude that race was not the predominant factor in designing District 12, and plainly was of sufficient import to preclude the entry of summary judgment.

The uncontroverted testimony of the legislators regarding their motivations was buttressed by expert testimony to provide an empirical basis for confirming the express statements of legislative intent. Dr. David W. Peterson, a statistician, conducted a study to examine the boundary of District 12 and its relation to the racial and political makeup of residents of that District and the surrounding area. J.S.App. 85a. Dr. Peterson found that the boundary of District 12 "can be attributed to political considerations with at least as much statistical certainty as it can be attributed to racial considerations," and discerned "no statistical indication that race was the predominant factor" in determining that boundary. J.S.App. 87a. Thus, he concluded that "there is at least one other explanation that fits the data as well as or better than race, and that explanation is political identification." *Id.*

Dr. Gerald R. Webster, a professor of geography, evaluated North Carolina's 1998 redistricting plan in accordance with five traditional redistricting criteria and compared that plan with the 1992 plan found unconstitutional in *Shaw II*. J.S.App. 107a. For the two criteria most relevant to this type of equal protection case (the allocation of local government or electoral units to congressional districts and geographic compactness), Dr. Webster's study showed a marked improvement in the current plan. The 1998 plan reduced the number of the State's 100 counties divided among different congressional districts to 22, down from 44 in 1992, a 50 percent reduction. J.S.App. 116a, 133a. The 1998 plan also reduced the number of election precincts divided among different congressional districts from 80 (out of a total of 2,531 precincts) in 1992, to only 2 under the current plan. J.S.App. 117a.

Dr. Webster also evaluated District 12 specifically using the two mathematical compactness measures, dispersion and perimeter compactness, developed by Professors Richard Pildes and Richard Niemi.[7] *See* J.S.App. 120a-130a. For District 12, dispersion compactness increased from 0.045 in 1992 to 0.109 in 1998, an increase of 142.2 percent, while perimeter compactness increased from 0.014 in 1992 to 0.41 in 1998, an increase of 192.8 percent. J.S.App. 127a-128a, 143a, 145a. Although the 1998 figures would still be characterized as relatively

[7] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 553-75 (1993) (hereinafter "Pildes & Niemi").

"low" according to the Pildes & Niemi criteria,[8] that by itself does not indicate constitutional vulnerability under *Shaw I*, since geographic compactness is not a constitutional requirement. *See Bush*, 517 U.S. at 962; *Shaw I*, 509 U.S. at 647. Indeed, other congressional districts throughout the country have low compactness scores, J.S.App. 121a, and, in each State, some district must be the least compact. J.S.App. 36a (dissenting opinion). Moreover, these guidelines do not take into account travel time compactness or District 12's design around a major transportation corridor. J.S.App. 127a, 130a, 134a. Another expert witness, Dr. Alfred W. Stuart, testified that of the 12 congressional districts in North Carolina, the revised District 12 "has the third shortest travel time (1.67 hours) and the third shortest distance (95 miles) between its farthest points[,]" a marked improvement over the 1992 plan. J.S.App. 105a-106a. Further, District 12 is designed around a major transportation artery, Interstate 85, to link major urban areas sharing a community of interests. This very same interstate highway was described as "a very real connecting cable" linking "a palpable community of interests" along a corridor of urban, suburban, and rural areas in the Eleventh District of Georgia, as redesigned to comport with this Court's decision in *Miller*. *Johnson v. Miller*, 922 F.Supp. 1556, 1563-64 (S.D. Ga. 1995), *aff'd*, 117 S.Ct. 1925 (1997).[9]

[8] *See* Pildes & Niemi, *supra*, at 564-65.

[9] It is important to note that the challenged district is *not* a majority-minority district. (District 12's voting age population is approximately 43% black and 57% white. J.S.App. 30a-34a (dissenting opinion)). Nevertheless, there is no basis in law for applying different standards to evaluate majority-minority

Based on the totality of the evidence, the district court majority plainly erred in granting summary judgment in favor of plaintiff-appellees. The record below disclosed genuine issues of material fact concerning the role of race in the redistricting process relative to traditional districting criteria, such as party politics, the legislature's predominant motivation or intent, and the methods and data used to design the District. Most importantly, there was no evidence whatsoever that race was considered in a constitutionally impermissible way; to the contrary, actual election returns provide compelling evidence that black voters are included in a dependably cohesive political community of interest in District 12. All inferences from this evidence should have been drawn in favor of the non-moving party (here, the State proponents of the plan). In sum, where the record contains substantial evidence that race was not or may not have been the legislature's predominant motivation or intent in drawing the boundaries of the challenged district, summary judgment should not be granted for plaintiffs in a *Shaw v. Reno* type equal protection case.

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districts, so-called "influence districts" in which blacks or Hispanics comprise a substantial minority of the voting population, and largely white-majority districts, nor should there be. *See Bush*, 517 U.S. at 958 (noting that strict scrutiny does not apply to "all cases of intentional creation of majority-minority districts"); *see also DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. 1994) (finding no basis for applying strict scrutiny to an intentionally created majority-minority district), *aff'd summarily in part and dismissed in part*, 515 U.S. 1170 (1995).

II. If the Court Were to Affirm the District Court's Entry of Summary Judgment in this Case, the Result Would Be an Unjustifiable Increase in the Number of *Shaw v. Reno* Type Equal Protection Cases Brought Before this Court

If the Court were to affirm the district court's entry of summary judgment here, the likely result would be an increase in the number of racial gerrymandering equal protection cases brought before this Court. Affirming the decision below would signal potential plaintiffs that the predominant factor test is not a major obstacle to succeeding in a *Shaw v. Reno* equal protection challenge. The message to potential plaintiffs would be that they can prevail, as a matter of law, even when the State presents substantial evidence indicating that race may not have been the predominant factor in its decision-making. Under this Court's precedents, plaintiffs must meet, and should be required to meet, a very demanding standard in order to prevail on the threshold question of the predominant factor motivating the legislature's decision. However, the practical effect of the decision below is to blur the distinction between the impermissible use of race as the "predominant" factor motivating the legislature's redistricting plan and the legitimate consideration of race as just one of a number of motivating factors. Any such blurring of this distinction will unjustifiably increase racial gerrymandering equal protection litigation.

In addition, sustaining the district court's entry of summary judgment for plaintiff-appellees here would afford those who have resisted the full enfranchisement of African Americans with a vehicle by which to assert equal protection challenges in an effort to dilute the

voting power of minorities and obtain a white supermajority in order to preclude the election of minority candidates or candidates responsive to minority interests. The Equal Protection Clause plainly was not enacted for the purpose of augmenting white majority voting power at the expense of minority voting power, and this Court should not sanction its use for such a purpose.

An increase in the number of challenges to redistricting plans in the district courts will inevitably increase the number of such cases this Court must address in some fashion, given the availability of direct appeal to this Court after adjudication of redistricting disputes by three-judge district courts. Moreover, given the sensitive and complex nature of the predominant factor inquiry, allowing district courts to grant summary judgment for plaintiffs in cases such as this will result in more appeals to this Court on partial and inadequate records. The absence of complete, fully vetted evidentiary records and detailed fact finding by the district courts in redistricting equal protection cases will make this Court's job on review more difficult, increase the number of reversals on technical or procedural grounds, rather than on the merits, and increase the number of times the same cases return to this Court.[10] The instant proceeding is a case in point. It is here all too clear that disposition by summary judgment does not promote judicial efficiency, but, quite to the contrary, is a prescription for repetitive and wasteful litigation both in this Court and in district courts.

[10] This Court's review in *Bush*, *Shaw II*, and *Miller* was based on the fully developed evidentiary records compiled at the district court level.

III. Even if the District Court Was Correct in Finding Race to be the Predominant Factor, the Court Erred by Granting Summary Judgment in Favor of Plaintiff-Appellees Without First Undertaking the Required Strict Scrutiny Analysis

If a district court finds that race was the predominant factor motivating the legislature's redistricting decision and that the legislature subordinated traditional districting criteria to race, that is not the end of the equal protection inquiry. Such a finding merely triggers strict scrutiny. Once strict scrutiny is deemed to apply, the State must be given the opportunity to show that redistricting legislation is narrowly tailored to serve a compelling state interest. *Bush*, 517 U.S. at 976; *Miller*, 515 U.S. at 920; *Shaw II*, 517 U.S. at 908; *Shaw I*, 509 U.S. at 658.

By skipping the second prong of the equal protection analysis mandated by this Court, the district court impermissibly treated strict scrutiny as "strict in theory, but fatal in fact." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (citation omitted). This was error because circumstances can and do exist in which a race-conscious remedy is narrowly tailored to further a compelling state interest. For instance, five Justices have expressed the view that compliance with section 2 of the Voting Rights Act is a compelling state interest,[11] and that section 2 is violated if, based on the totality of circumstances, members of a minority group have less opportunity than

[11] *Bush*, 517 U.S. at 990-92 (O'Connor, J., concurring); *id.* at 1033 (Stevens, J., joined by Ginsburg and Breyer, J.J., dissenting); *id.* at 1046 (Souter, J., joined by Ginsburg and Breyer, J.J., dissenting).

others to participate in the political process and to elect representatives of their choice. *See* 42 U.S.C. § 1973(b).

Thus, a district may withstand a constitutional challenge even if race was the predominant factor motivating the legislature and strict scrutiny is triggered. In order to satisfy strict scrutiny, a State may demonstrate a compelling state interest by showing that there is a "strong basis in evidence" for concluding that section 2 liability exists or that the potential for such liability may exist. *Bush*, 517 U.S. at 977 (citation omitted). A State's predominant reliance on race-conscious districting is narrowly tailored to serve a compelling interest if it "substantially addresses the § 2 violation," and if traditional districting principles are not subordinated to race "substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 977, 979 (citations omitted).[12] Further, a district designed to comply with section 2 need not have "the least possible amount of irregularity in shape," and may pass strict scrutiny without winning "beauty contests" against rival districts designed by plaintiffs' experts. *Id.* at 977.

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[12] The first precondition for liability under section 2 under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), focuses on the existence of a sufficient minority population to justify the creation of majority-minority districts. Here, of course, the challenged District 12 is not a majority-minority district, since only 43% of the voting age population of the District is black, while 57% is white. J.S.App. 30a-34a. However, in *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), this Court left open the possibility that minority voters could state a viable section 2 claim if a redistricting plan deprived them of "influence districts" in which they constitute a substantial (and thus supposedly influential) minority.

Relying on this Court's recent decisions on strict scrutiny, most lower courts have treated the strict scrutiny analysis as an integral part of the equal protection inquiry in redistricting cases. The Fifth and Tenth Circuits have each addressed how the strict scrutiny prong of the equal protection analysis preserves the availability of race-conscious remedies under section 2 of the Voting Rights Act. *Sanchez v. Colorado*, 97 F.3d 1303, 1326-29 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1820 (1997); *Clark v. Calhoun County*, 88 F.3d 1393, 1402-08 (5th Cir. 1996). In each of these cases, the court echoed the majority of Justices who have indicated that compliance with section 2 constitutes a compelling state interest and noted that districts drawn predominantly on the basis of race will be narrowly tailored if race overrides traditional districting principles no more than is reasonably necessary to remedy a section 2 violation. *Sanchez*, 97 F.3d at 1327; *Clark*, 88 F.3d at 1407-08. In at least two instances, district courts have held that a district designed with race as the predominant motivating factor nevertheless passed strict scrutiny because the legislature's action was narrowly tailored to remedy a section 2 violation. *Addy v. Newton County*, 2 F.Supp.2d 861 (S.D. Miss. 1997) (appeal pending); *King v. State Bd. of Elections*, 979 F.Supp. 619, 622-27 (N.D. Ill. 1997), *aff'd without opinion*, 118 S.Ct. 877 (1998).

The application of strict scrutiny in the equal protection redistricting context must not be construed as "fatal in fact" if the Court is to avoid a head-on collision between its equal protection redistricting jurisprudence and section 2 of the Voting Rights Act. The tension between these two bodies of law creates a dilemma for

state legislatures: if, on the one hand, a district is considered not sufficiently compact and the percentage of minority voters in the district is high, the district may be invalidated for using race as its predominant motivating factor; yet, if a substantial minority population is dispersed among different districts in relatively low proportions, such that minority voters do not have a fair opportunity to elect candidates of their choice, then those voters may well claim a violation of section 2. The strict scrutiny prong of the equal protection inquiry at least makes it possible for States to wend their way between "the Scylla of racial gerrymandering [as proscribed in *Shaw* and its progeny] . . . and the Charybdis of minority vote dilution" under section 2 of the Voting Rights Act. *See* Lublin & Voss, *supra*, at 773. Strict scrutiny must afford a meaningful opportunity for challenged districts to pass constitutional muster if States are to be able to design districts that comport both with the Equal Protection Clause and with section 2 of the Voting Rights Act. Eschewing this crucial step, as the district court majority did here, is unjustified as a matter of law and contrary to prudent judicial decision-making.

CONCLUSION

For the reasons stated above, the order of the district court below granting summary judgment in favor of plaintiff-appellees should be reversed and the case remanded for trial.

Respectfully submitted,

MATTHEW J. ZINN
(*Counsel of Record*)
DAVID A. STEIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-429-3000

JACK W. LONDEN, Co-Chair
DANIEL F. KOLB, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
EDWARD STILL
GILDA R. WILLIAMS
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W., Suite 400
Washington, D.C. 20005
202-662-8600

JAMES U. BLACKSHER
Title Bldg., Suite 710
300 21st Street North
Birmingham AL 35203
205-591-7238

Attorneys for Amicus Curiae Lawyers' Committee for Civil Rights Under Law

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